FILED

In the Supreme Court of the United States

OCTOBER TERM, 1961.

No. 312.

IN THE MATTER OF THE PETITION FOR A WRIT OF HABEAS CORPUS FOR MERRITT W. GREEN II.

MERRITT W. GREEN II,

Petitioner.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

REPLY BRIEF FOR PETITIONER.

FRED A. SMITH,
700 Toledo Trust Bldg.,
Toledo 4, Ohio.

IRVING A. FRIEDMAN,
7 S. Dearborn,
Chicago, Illinois.

ROBERT A. BURNS,
5403 Summit Street,
Toledo 4, Ohio.

MERRITT W. GREEN,
400 Security Bldg.,
Toledo 4, Ohio.

Counsel for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-8647

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REPLY BRIEF FOR PETITIONER.

I. The Respondent Misconstrues Rule 23.

The respondent's brief begins by asserting that Section 1 (f) of Rule 23 of the Revised Rules of this Court applies to the petitioner's brief in this case. Assuming that assertion to be correct, the claim is made that the petitioner's failure to comply with Rule 23 results in a forfeiture of his right to have this Court consider the federal questions which are before the Court by reason of the granting of the Petition for Certiorari to the Supreme Court of Ohio.

We suggest that the respondent has misconstrued the contents of Section 1 (f) of Rule 23, which have reference only to the "Petition for Certiorari". The respondent's references and arguments in this connection would seem to be completely invalid.

II. Respondent Injects Issue Not Heretofore Considered on Petition for Certiorari or by Ohio Courts.

The respondent not only seeks to change the substance of the questions presented when this Court granted certiorari to the Supreme Court of Ohio but does, it seems clear, attempt to inject at least one entirely new issue into this case.

We have particular reference to question 3 at page 2 of the respondent's brief and the entire subdivision III which begins on page 14 and continues on through page 20.

Even though the request for injunction filed in the Court of Common Pleas by the Toledo Marine Terminals, Inc. was in the form of an action for breach of a no-strike clause in a collective bargaining contract, the right of a state court to issue an ex parte injunction denying members of a labor union the right to picket peacefully because of an alleged violation of a no-strike clause in a collective bargaining contract was not an issue considered by the Ohio Court of Appeals or the Supreme Court of Ohio. The question was not urged or suggested by the petitioner in his Petition for Certiorari or by the respondent in opposition to the petition.

A claim for state court jurisdiction predicated on a breach of contract action was not made by the Ohio courts simply because it was made clear to the Court of Appeals at the June 9 habeas corpus proceeding that the labor dispute which began with a strike on May 15th continued on through the time when the petition for injunction was filed (R. 3) and was finally settled on the day (June 9) the Court of Appeals proceedings took place.

The parties also told the Court of Appeals, during the oral argument, that the labor dispute which ended in a settlement on June 9 resulted in a valid collective bargain-

ing contract being executed containing different terms and conditions than the incomplete contract attached to the petition for injunction as an exhibit. In any event, the Ohio Court of Appeals and the Supreme Court of Ohio did not consider the action in the Court of Common Pleas as presenting the issue sought to be injected into this case now by the respondent. (R. 50, last line 64, 65, top.)

III. The Essential Facts Supporting Petitioner's Contentions Not Disputed.

Aside from the tailoring of facts in an effort to give support to the new issue sought to be injected into this case, the respondent's answer brief, with one or two exceptions to be noted hereafter, is in substantial agreement with the statement of the case set forth in the petitioner's brief. The essential facts are not in dispute. For instance:

> The labor dispute which caused the strike on May 15, 1960 was still in progress on May 27, 1960, the day the unfair labor practice charge was filed by the union and the action for injunction was started by the employer. (R. 3.) Mr. Ragan, attorney for the employer, referring to the unfair labor practice charge filed against the employer for refusal to bargain, said:
>
> "The unfair labor practice charge was not based on the contract. It alleged in a vague sort of way that the company, the employer, Toledo Marine Terminals, had refused to bargain collectively, although at the time it was filed negotiations were almost continually under way. * * *."
>
> Even though the men had returned to work for two days, the signing of the agreement by the President of the company and some of the union officials on the night of May 26th obviously did not end the labor dispute which started with the picketing on May 15th;

immediately thereafter (6:00 A. M., May 27th) picketing was resumed. (R. 10, 18.)

The original Common Pleas Court action sought only an injunction to prohibit picketing. The action was not one for specific performance. (R. 11, Par. 12.)

The picketing, notwithstanding the court order, was continued on the basis of a decision by the union officials in Chicago in an effort to obtain a court hearing on the question of State vs. Federal jurisdiction via habeas corpus. (6, Resp. Brief; R. 25, 41.)

The picketing was in all respects peaceful. This was an agreed fact. (R. 2.) See also R. 5 where pictures which were part of the record before the Court of Appeals were described.

Also at page 13 of the respondent's brief it is admitted that the petition upon which the ex parte injunction was issued did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence or intimidation.

Respondent agrees (Brief 5, 33) that petitioner was not permitted to testify at his contempt "hearing," June 7, 1960.

IV. Petitioner Did Not Tell Union to Violate Order. Client Only Advised of Status and Remedy Available in the Circumstances then Prevailing.

The respondent's brief at page 4, where it is claimed that the union was told by him to violate the "no-picketing" order of the court, is not only inaccurate but inconsistent with the statement at page 6 where the respondent concedes that the petitioner told the court that the picketing continued as a result of a decision of the union officials.

The petitioner had advised the union officials in Chicago that in view of the issuance of the ex parte injunc-

tion and the court's adamant refusal to set the matter for hearing to consider the question of jurisdiction, continuation of picketing and the filing of an application for a writ of habeas corpus if the pickets were held to be in contempt would result in a hearing where the jurisdiction issue could be raised. (R. 24, 25, 41.)

What the petitioner did was advise his clients in Chicago of the status of the court action in Toledo and what course of action might be available to them under the then prevailing circumstances. The whole record does not, we believe, justify the assertion that the petitioner told the union to violate the court order or that the union continued picketing for the purpose of defying constituted authority. (See dissenting opinions—R. 55, 69. Also R. 41, 43.)

V. Respondent's Claim That Offer to Prove Cured Denial of Trial and that Denial of Due Process Was Not Asserted is not Tenable.

At page 7 of the respondent's brief (2nd paragraph) it is suggested that the petitioner did not, during the hearings in the Common Pleas Court on June 1, June 3 and June 7, raise the question of "due process" with respect to the way his "own contempt of court" hearings were being conducted in that court. Obviously the petitioner could hardly raise the question at the June 1st and June 3rd hearings that he was denied due process at his "own contempt of court" hearing on June 7th. The June 1 and 3 hearings involved only the union officials charged as being in contempt.

The action of the court in announcing at the outset of the June 7th proceedings that there would be no trial or hearing (R. 34) and in refusing the petitioner's request to testify (R. 34, 35) was in and of itself denial of due

process, a fact which the respondent somehow seems to believe was cured when the petitioner's counsel, with substantial opposition from the court, read into the record, as an offer to prove, what the petitioner would have testified to had he been permitted to take the stand (R. 35).

We suggest that an offer to prove read into the record for the benefit of a reviewing court can hardly be an acceptable substitute for a complete hearing or trial before a court which has not already determined guilt.

The respondent's brief indicates a refusal to recognize that the offer to prove read into the record at the June 7th hearing became the undisputed and uncontradictable evidence before the Court of Appeals in the habeas corpus proceedings, and that despite the respondent's inability to recognize where the denial of due process was asserted, both the Court of Appeals and the Supreme Court of Ohio considered that question as one of the issues in the case.

VI. Acceptance of Respondent's Theory of State Court Jurisdiction Would Repudiate the Doctrine of Federal Pre-emption.

The respondent's advocacy of the proposition that state courts are entitled to use ex parte injunctions to prohibit peaceful picketing even in the absence of any claim of mass picketing, public disorder, violence, or threat of violence, is patently violative of many decisions of this Court. To accept such a proposition would require a complete reversal of the pre-emption doctrine, now firmly a part of national labor policy.

The strained reasoning which is necessary to suggest the approval of the use of the ex parte injunction in peaceful picketing cases is evident in the two paragraphs set forth under Section (b) of the respondent's brief on page

13. There the respondent admits that the petition did not contain an allegation of one fact relating to mass picketing or picketing accompanied by violence or intimidation and that the petition contained only conclusions on the part of the pleader to the effect that if the court did not enjoin the "unlawful" picketing, the picketing would "result in danger to life and limb of the employees of plaintiff company and irreparable loss and damage to the plaintiff company".

The respondent then suggests that merely pleading these conclusions without basing them on any facts "is enough to justify the court in taking preventative steps." This, the Court will note, is coming out foursquare for the proposition that state courts should be permitted to enjoin picketing in labor disputes involving interstate commerce without regard to the conditions prevailing when the injunction is sought.

The respondent suggests that in our case the absence of mass picketing or picketing accompanied by violence or intimidation at the time the petition was filed was "only because the restraining order anticipated such violence and prevented it from happening" (Resp. Brief, 13). However, the respondent does not explain just how the restraining order which had not been issued at the time the plaintiff drafted the petition, prevented violence from happening before the petition was filed.

VII. Nature of Dispute and Conduct Involved, Not Mode of Regulation, Determines Tribunal to Decide Issues.

As we have already pointed out, the respondent attempts to bring before this Court an issue which has not been considered by the Ohio courts and which has not heretofore been a part of the proceedings in this Court.

Under any circumstances, we say that the issue of

whether "a state court may enforce a collective bargaining contract" (respondent's brief 14) is not a part of this litigation. The answer to that bare question, we believe, is no longer open to argument. The question, if it were appropriate at this time, would be whether the form of action filed in a state court is determinative of the question of State versus Federal jurisdiction.

It is the nature of the dispute or controversy as well as the conduct sought to be enjoined, and not the mode of regulation or the cause of action upon which a suit is based that determines which tribunal has a right to decide the issues involved.

In *San Diego Building Trades Council vs. J. S. Garmon,* 359 U. S. 236 (1959) the court held, among other things, that state courts, in an action to enjoin peaceful picketing, are not to determine whether the court has jurisdiction but rather to determine whether or not the dispute and activity sought to be enjoined is arguably or potentially within the jurisdiction of the National Labor Relations Board, deferring to that latter tribunal full authority to determine whether the dispute or controversy or conduct of the respective parties is a protected, unprotected or prohibited activity under the Labor-Management Relations Act. Any doubt, this Court held, must be in favor of the N. L. R. B. jurisdiction.

VIII. The Respondent's Claim That Assumption of Jurisdiction Creates Jurisdiction Would, as Here, Effectively Nullify Federal Law.

In Section 4 of the respondent's brief starting at page 21, the respondent urges this Court to adopt a rule embracing the effect of the Ohio Supreme Court's decision holding that even though a court does not have jurisdic-

tion over the subject matter of an action, assumption of jurisdiction, nevertheless, gives the court a right to issue valid orders until such time as that particular court determines that it is lacking in jurisdiction.

The respondent says that "the Ohio court, when asked to issue a restraining order, has a right to determine its own jurisdiction," and that "pending such determination the petitioner was obliged to obey such order."

The Court will note that here the respondent is contending for a proposition somewhat different than the one primarily relied upon by the Ohio courts to justify the demand for obedience of an order issued to preserve the status quo pending a hearing on the merits of the subject matter over which the court has jurisdiction (conditions not present in our case).

We have, in our principal brief beginning at page 35 and through page 38, pointed out where this case is clearly distinguishable from the bona fide status quo cases of *United States vs. John Shipp, et al.*, 203 U. S. 563 (1906) and *United States vs. United Mineworkers, etc.*, 330 U. S. 258 (1947).

The proposition now contended for by the respondent is, in effect, that an ex parte temporary injunction issued out of a court of general jurisdiction must be obeyed, however erroneous the action of the court may be, until the decision of the initial court in determining that it has jurisdiction over the subject matter is reversed either by itself or by a higher court.

In contending for this proposition respondent relies upon *Howat vs. Kansas*, 258 U. S. 181 (1922). The *Howat* case, it seems to us, is not applicable to the issues in this case as is evident from a brief examination of the issues which were before the court there.

The defendants there were originally charged with conspiring, threatening and directing the calling of a general strike in the coal mines in certain counties in Kansas which, if a cessation of work resulted, would endanger the peace and order of the communities in which the coal mines were located. It was charged also that in pursuance thereof they were intimidating their co-workers and other employees of the mines and further, that the purpose of the conspiracy was to stop the operation of the railroads, buildings, institutions and industries of the State in the conduct of its governmental affairs, etc. etc.

The defendants claimed that the Industrial Court Act, under which the proceeding against them was brought, was void and for that reason the state court was without power to issue an injunction restraining a strike in the coal mines. After the introduction of evidence, the court made permanent the temporary injunction already awarded, which injunction, in addition to prohibiting a strike, enjoined the defendants from maintaining and carrying on a conspiracy with the intent to evade the provisions of the Industrial Court Act. *This judgment was not appealed.*

Thereafter the defendants were charged in an affidavit filed by the Attorney General with violating the injunction by combining to order and compel a strike at two mines.

At the contempt hearing where the defendants were represented by counsel, they answered attacking the validity of the Industrial Court Act and of the permanent injunction. The court, after a full hearing, found the averments of the accusation were sustained.

On appeal the Supreme Court of Kansas held that the District Court in the original action had general power to issue injunctions in equity and that, even if the issuance of the injunction was erroneous, the judgment was not void,

and the defendants were precluded from attacking it in a collateral proceedings (the collateral proceedings being the attempt to again test, in the contempt proceedings, the validity of the Act which created the Court of Industrial Relations and the validity of the permanent injunction).

The Kansas Supreme Court noted that aside from the Industrial Court Act, the district court also had power to issue the permanent injunction on principles identical with those applied in abatement of public nuisances. The court held that, if the injunction order was erroneous, jurisdiction was not thereby forfeited; that the error was subject to correction only by the ordinary method of appeal.

This brief resume of the facts in the *Howat* case clearly illustrates the difference in the principle involved in our case and the one that was involved in *Howat*. There, of course, the Kansas court had jurisdiction over the subject matter of the injunction case on the basis of provisions in the Industrial Court Act and, as the Supreme Court pointed out, on the basis of abating a public nuisance. That injunction action was fully tried on the evidence and the court issued a permanent injunction order. The defendants did not appeal that order. Instead they made the collateral attack on the injunction order.

In our case, as pointed out in our principal brief, jurisdiction over the subject matter of the action has been effectively withdrawn from the States by the Labor-Management Relations Act of 1947. Over and above what we have already said relative to the distinction between *Howat* and our case, we repeat what we have already said in our principal brief:

The Ohio court had no right to arrogate to itself jurisdiction which has been withdrawn from the state courts by the Labor-Management Relations Act of 1947 because the labor dispute and controversy here was arguably subject to the jurisdiction of the National Labor Relations Board.

IX. Respondent's Brief Gives Distorted Picture of Facts.

Subdivision V of the respondent's brief, at least Sections A, B, C and D thereof, seems to be fashioned to give the appearance that the petitioner's actions on behalf of, and his advice to, his clients were motivated by a spirit of defiance rather than being an honest effort to obtain justice for his clients within the framework of the law governing labor-management relations affecting interstate commerce.

We suggest that the excerpts from the record used in the respondent's brief on page 25 through the top of page 30 are taken out of context from the record for that purpose. The picture the respondent attempts to paint through this method is distorted, to say the least. It is not justified on the basis of the record and is, we suggest, completely erroneous.

We have, we believe, covered fully in our brief (pp. 52-62) the right of a lawyer acting in good faith and in the honest belief that his advice is well founded and is in the just interests of his client, to fully advise and represent his client in, as in this case, the course of action the client decides to take.

There is nothing in the respondent's brief on this subject which warrants further discussion here.

X. Claims of Direct Contempt and of Waiver and "Cure" of Denial of Due Process are Fallacious.

The respondent's brief makes the claim (p. 30) that the petitioner was guilty of direct contempt despite the fact that the Ohio courts did not so hold and in face of the obvious belief of the trial court that the conduct complained of constituted indirect contempt. That this is so is clear from the fact that the Judge personally filed writ-

ten charges under the provisions of Section 2705.02 and 2705.03 of the Revised Code of Ohio. (R. 29.)

If the trial court thought the petitioner guilty of direct contempt, the court had authority to act summarily not only by reason of the court's inherent power, but by reason of the provisions of Section 2705.01 of the Ohio Revised Code which reads:

> "A court, or Judge at chambers, may summarily punish a person guilty of misbehavior in the presence of or so near the court or Judge as to obstruct the administration of justice."

Section 2705.02, Ohio Revised Code enumerates acts of indirect contempt for which a person may be punished and Section 2705.03 R. C. provides that in proceedings under Section 2705.02 a charge in writing shall be filed and an opportunity given to the accused to be heard, etc. etc.[1] The record in this case, we submit, does not justify the respondent's claim that the court was dealing with a direct contempt.

The respondent argues that even if indirect contempt had been the proper charge, the petitioner was not deprived of due process when the court found him guilty and sentenced him without a hearing or a trial.

The respondent admits at page 5 of its brief that the trial court refused the petitioner the right to testify at the June 7th proceedings. There is no denial that at the beginning of those proceedings the court made it clear that "you are not here for any hearing or trial." (R. 34.) The respondent now asserts that "any harmful consequences" of the refusal of the court to hold a hearing or allow the petitioner to testify or call witnesses were cured when "the

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[1] Ohio Revised Code sections 2705.02 and 2705.03 are set out and discussed in the principal brief at pages 17, 66 and 73.

offer to prove" was read into the record by counsel. (Brief p. 33.)

The contents of the claim of a waiver and "cure" made by the respondent at page 33 of its brief clearly stamps these contentions to be completely fallacious. Nothing more, we suggest, need be added by us.

CONCLUSION.

There is nothing in the respondent's brief which warrants affirmance of the Ohio decisions. On the contrary, we believe that the petitioner's release should be ordered.

Respectfully submitted,

FRED A. SMITH,
ROBERT A. BURNS,
MERRITT W. GREEN,
IRVING A. FRIEDMAN,
Attorneys for Petitioner.